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No. _____

In the Supreme Court of the United States

Guy Heide, Michael A. Kosel and Duane Taylor
Petitioners,
v.

Federal Aviation Administration
Respondents,

Metropolitan Airports Commission
Intervenor on Appeal

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Filed *pro se*

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* Designated to receive service in this matter.

Petitioners sought judicial review of two Federal Aviation Administration Orders (a 1990 order and a 2003 order). The appellate court dismissed the petition concerning the 1990 order as "untimely" and dismissed the petition concerning the 2003 order for failing to establish "standing."

QUESTIONS PRESENTED

1. Whether the sixty day calendar, within which a timely petition for review can be filed pursuant to 49 U.S.C. 46110(a), is still tolling on a June 5, 1990 Federal Aviation Administration Order that concealed the exposure of 12,000 persons to significant levels of damaging aircraft noise.

2. Whether the appellate court deprived John G. Bulov of his "due process" property rights (Amendments V and XIV) and prevented the Airport Noise Reduction Committee from establishing "standing" when the appellate court denied a Motion to admit John G. Bulov as a fourth petitioner.

PARTIES TO THE PROCEEDING

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state there are no parent companies or nonwholly owned subsidiaries.

Petitioners Guy Heide, Michael A. Kosel and Duane Taylor are Secretary, Chairman and Treasurer of the "Airport Noise Reduction Committee" which has represented the interests of members in communities (such as Rogers Lake East and Bloomington) adjacent to Minneapolis-St. Paul International Airport ("MSP"). The "Airport Noise Reduction Committee" is an unincorporated group or association.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Guy Heide, Michael A. Kosel and Duane Taylor pray the Supreme Court grant a Writ of Certiorari to review the judgment of the 8th Circuit Court of Appeals below.

OPINIONS BELOW

The opinion of the 8th Circuit Court of Appeals (App., *infra*, 3a-7a) is unreported.

JURISDICTION

The court of appeals' opinion and judgment was entered on August 26, 2004 (App., *infra*, 3a-7a). A timely petition for rehearing was denied on November 18, 2004 (App., *infra*, 2a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution provides in relevant part: "* * * nor shall any person * * * be deprived of * * * property without due process of law." Amendment XIV provides: "* * * nor shall any State deprive any person of * * * property, without due process of law."

The *Noise Control Act* provides in relevant part (49 U.S.C. 44715(a)(1)(A)) that the FAA shall: "relieve and

protect the public health and welfare from aircraft noise.

Concerning "Judicial review" 49 U.S.C. 46110 (a) provides:

> Filing and Venue. – * * * a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Federal Aviation Administration * * *) under this part may apply for review of the order by filing a petition for review in the * * * court of appeals of the United States for the circuit in which the person resides * * * The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

STATEMENT

Federal jurisdiction in the 8th Circuit Court of Appeals (the court of first instance) was sought pursuant to 49 U.S.C. 46110 (a), *supra*, seeking judicial review of two Federal Aviation Administration ("FAA") orders.

A. CONCERNING THE 1990 ORDER

Minneapolis-St. Paul International Airport's ("MSP") current runway use system ("RUS") was implemented by a June 5, 1990 order ("the 1990 order") a Finding of No Significant Impact ("FONSI"). The FONSI was based on a May 25, 1990 Environmental Assessment ("EA") that forecast the new RUS would reduce the population exposed to significant levels of aircraft noise from "18,340 to 17,409" persons (Record, Tab 18 p. 5).

However, the new RUS *increased* the impacted population to "30,370" persons (a +66% increase; Record, Tab 20 p. 2-11) instead of reducing the impacted population to "17,409" persons.

FONSIs are not announced in the Federal Register or FAA advisory circulars. DOT Order 5050.4A, Section 66 provides in relevant part (Record, Tab 3, pp. 69, 70):

> The regional office shall * * * formulate a system for announcing the availability of the finding of no significant impact through appropriate media in the area affected and in cooperation with the sponsor of the project * * * [indicating] locations at which the finding of no significant impact is available * * * Copies of findings of no significant impact shall be provided, on request, free of charge or at a fee commensurate with the cost of reproduction.

In the administrative record, the FAA failed to comply with Order 5050.4A *supra*, and did not announce the June 5, 1990 order (FONSI) in the media.

In the airport's 1987 noise exposure map petitioners' homes were on "compatible" land. The airport's 1992 five-year forecast map predicted their homes would continue on "compatible" land[1]. However, petitioners discovered that in 1991, their homes had

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[1] As will be described more fully under "Aircraft Noise" in the next section, "compatible" residential land is land outside the 65 DNL Contour.

moved from "compatible" to "noncompatible" land areas in the airport's Part 150 1991 Noise Exposure Map.

By filing government data requests, petitioners inadvertently discovered the 1990 order (the June 5, 1990 FONSI) and realized the new RUS appeared to have "significantly" impacted their City of Mendota Heights.

An inspection of the EA that authorized the FONSI disclosed the FAA had deleted the entire City of Mendota Heights from the environmental analysis that foretold a reduction from "18,340 to 17,409" persons, *supra*. If Mendota Heights had been included (as it should have been), evidence suggested the EA would not have forecast a reduction. Additional evidence suggested approximately 4,100 departures had been moved from the south end of MSP's parallel runways to the north end to create a sham positive environmental impact.

Petitioners filed an October 27, 2003 petition seeking judicial review of the 1990 order, arguing the FAA's failure to give a sufficient and adequate notice[2] provided "reasonable grounds" to review the 1990 order. The court of appeals docketed the petition, requesting briefs after submission of the administrative record.

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[2] In the administrative record, the FAA has not published a public notice concerning the 1990 order.

On May 4, 2004, after receiving the petitioners' brief, the FAA inserted into the administrative record a press release, stating in their Brief:

> On June 8, 1990, the FAA issued a press release announcing the completion of the EA and issuance of the FONSI * * * It set forth the locations where the environmental assessment and findings were available for public review (ibid.). (FAA Br. p. 46)

After receipt of the briefs, the court of appeals denied review of the 1990 order as "untimely" stating:

> Petitioners assert that it was impossible for them to file a petition within the sixty-day filing period. * * * We are not persuaded * * * it is the date of the order's issuance that is pertinent under [Section] 46110(a). * * * The record also reveals that the FAA issued a press release on June 8, 1990, announcing its decision and noting where copies of the FONSI and EA could be accessed by the public. Thus, we find no merit in Petitioners' claim that the FAA concealed the 1990 order from the public. (App., *infra*, 4a-5a).

B. CONCERNING THE 2003 ORDER

The FAA issued a new FONSI on August 27, 2003 (the 2003 order) to implement a departure/arrival procedure for MSP Runway 17. An inspection of the record appeared to again include fictional or fraudulent representations, for example:

- In the Record of Decision (ROD), the FAA gave an assurance that the projected 2005 Runway

17 noise impact in the Final Environmental Impact Statement ("FEIS") was "the worst-case" even under the High Forecast (Record, Tab 28 ROD p.19).

- The 2005 FEIS noise impact was "29,680" persons (Record, Tab 24 FEIS p. V-77).

- However, in the EA used to authorize the August 27, 2003 FONSI, the Alternative E departure procedure (the procedure approved in the 2003 order) impacts "48,840" persons (not "29,680" persons). (Record, Tab 164 EA p.18).

The 2003 order impacts "48,840" persons, a +65% increase above the "29,680" person FEIS forecast *supra* (+19,160 additional persons). The FAA's representation that "29,680" persons was the "worst case" was obviously untrue. The Alternative A "No Action" map in the EA converts this +65% increase (from "29,680" to "48,840" persons) into a -9% reduction (from "53,697" to "48,840" persons). (Record, Tab 164 EA p.18).

Therefore, petitioners' October 27, 2003 petition also sought judicial review of the 2003 order. The court of appeals docketed the petition, requesting briefs after submission of the administrative record.

To establish their "standing," on February 9, 2004 petitioners filed a Motion to admit John G. Bulov (a member of the Airport Noise Reduction Committee) as a fourth petitioner (App., *infra*, 12a):

- Mr. Bulov's home off the end of Runway 17 experienced a significant impact.

- The FAA opposed the Motion asserting, in relevant part, the Bulov home would be "taken" prior to implementing the FONSI's departure procedure, therefore "his home will not exist at the time the runway becomes operational" and "Mr. Bulov will suffer no injury in fact." (App., *infra*, 13a).

- On February 25, 2004 the Court denied admittance to Mr. Bulov without giving an opinion. (App., *infra*, 9a).

After receipt of the briefs, the court of appeals also denied a review of the 2003 order for failure to establish "standing" stating:

> Petitioners * * * live east of MSP in an area which the record shows will not be impacted by the departure procedures. Thus, Petitioners have not demonstrated a concrete, particularized injury due to the departure procedures. (App., *infra*, 6a).

REASONS FOR GRANTING THE PETITION

1. AIRCRAFT NOISE

In Griggs v. Allegheny County, 82 S.Ct. 531(1962) the Supreme Court decided aircraft noise had taken an air easement over Griggs' property making his home "unbearable for residential use," awarding money damages under the Fourteenth Amendment; thereafter:

- In the Noise Control Act (1972) Congress ordered the FAA "to relieve and protect the public health and welfare from aircraft noise" [49 U.S.C. 44715(a)(1)(A)].

- The Aviation Safety and Noise Abatement Act ("ASNA") (1979) ordered the FAA to "establish a single system for determining the exposure of individuals to noise resulting from airport operations" and "identify land uses normally compatible with various exposures of individuals to noise." [49 U.S.C. 47502(2) and (3)].

- ASNA also authorized airports to submit noise compatibility programs that would "reduce existing noncompatible uses and prevent introducing additional noncompatible uses" [49 U.S.C. 47504(a)(2)] and authorized the FAA to fund approved programs.

- The FAA issued "Part 150—Airport Noise

Compatibility Planning" regulations found in 14 C.F.R. The Part 150 Regulations set forth a "DNL" metric to calculate noise exposures and, in relevant part, established the 65 DNL Contour (and above) as the boundary within which land became "noncompatible" for residential land use (see Part 150 Appendix A, Table 1). Typically, airports that submit noise compatibility programs either insulate homes for aircraft noise within the 65 DNL Contour in return for an air easement (when possible) or purchase the homes outright.

- In the Airport and Airway Improvement Act (1982) Congress tied Federal airport grants to projects that "minimize current and projected noise impact on nearby communities," provide for "the quality of the environment," and reduce "[n]oncompatible land uses around airports" giving "efforts to mitigate noise * * * a high priority" [49 U.S.C. 47101(a)(2), 47101(a)(6) and 47101(c)].

Aircraft noise at major airports is a national issue.

2. THE DIVISION AMONG THE CIRCUITS OVER WHEN THE SIXTY DAY CALENDAR BEGINS TO RUN, REQUIRES THE SUPREME COURT TO EXERCISE ITS SUPERVISORY POWER

In declining to review of the 1990 order, the 8th Circuit decided the sixty day calendar began to run from "the date of the order's issuance" (App., *infra*, 4a).

Presumably the 8th Circuit is of the opinion a timely petition was due on or before August 5, 1990 (sixty days from June 5, 1990).

CONFLICT WITH THE D.C. CIRCUIT

In RCA Global Communications, Inc. v. F.C.C., 758 F.2d 722 (D.C. Cir. 1985), that Court decided RCA had failed to receive a notice of "sufficient clarity" and that "the calendar does not run until the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the rule's content" (p. 730).

In National Air Transportation v. McArtor, 866 F.2d 483 (D.C. Cir. 1989), that Court again decided "the original notice of the rule was inadequate to start running of 60-day time limit on seeking judicial review, but such inadequacy merely tolled the statutory time limit until proper notice was furnished" (p. 483); "notice is sufficient if it affords interested parties a reasonable opportunity" (p. 485; quoting Forester v. Consumer Product Safety Comm'n, 559 F.2d 774, 787 (D.C. Cir. 1977).

CONFLICT WITH THE 11TH CIRCUIT

In Florida Manufactured Housing Association, Inc. v. Cisneros, 53 F.3d 1565 (11th Cir. 1995), that Court decided "[a]s a matter of fairness, the sixty-day filing period should not begin to run until the public has notice of the final rule's content." (p. 1575).

CONFLICT WITH THE 7TH CIRCUIT

In Northwest Tissue Center v. Shalala, 1 F.3d 522 (7th Cir. 1993), that Court decided "plaintiffs may be 'forgiven' for failing to file a timely challenge to the 1980 and 1987 regulations because the facts they allege indicate that they may not have received adequate notice of the effect of the regulations." (p. 530).

This decision is of interest because the Court addressed the situation (present here) where several years had passed, stating: "Other courts have allowed challenges years after the agency promulgated the regulation" (p. 531).

CONCLUSION

This petition provides the Supreme Court with an occasion to give guidance and maintain uniformity concerning when the calendar begins to run for the filing of "timely" petitions to review agency orders. Petitioners believe if their petition had been filed in the D.C., 7th or 11th Circuits, those courts of appeal would have ruled the sixty day calendar is still tolling on the 1990 order (as an adequate and sufficient notice has not yet been published) and our case would have been heard on the merits.

3. THE ABUSE OF THE FAA's POSITION OF TRUST AND CONFIDENCE SHOULD SHOCK THE CONSCIENCE OF THE COURT SO AS TO HEAR THE CASE ON THE MERITS

As set out in Petitioners' Brief, the 1990 order resulted in an estimated pecuniary gain of $247,490,000 (Pet. Br. pp. 33-35) when the movement of an estimated 12,030 persons onto "noncompatible" land was concealed with an unmeritorious FONSI. Under Griggs *supra*, the airport operator is liable for damages caused by aircraft noise. However, since the FAA typically funds Part 150 noise compatibility programs with Airport and Airway Trust Fund grants and other forms of Federal funding, the $247,490,000 pecuniary gain (in the form of reduced Part 150 noise mitigation funding requests) provides an inducement for the FAA to issue an unmeritorious FONSI. As in this case, an unmeritorious FONSI can leave tens of millions of dollars in the Airport and Airway Trust Fund, for the FAA to use in promoting other aviation industry interests, not associated with noise mitigation.

DOT Order 1050.1D provides in relevant part:

> In this context, if the noise analysis * * * concludes that there is no significant impact, a similar conclusion usually may be drawn with respect to compatible land use. (Record, Tab 2 p. 11)

Based on the interpretation in the DOT Order *supra*, with an unmeritorious FONSI in place (issued), the FAA and/or the airport operator can argue there has been no change "with respect to compatible land use" (even when noncompatible land use has increased).

CONCLUSION

If our petition is "timely," we appeal for a hearing on the merits to obtain the rescinding of the FAA's 1990 order that sacrificed the "health and welfare" of an estimated 12,030 persons for over $200 million in pecuniary gain, in violation of the FAA's statutory duty to "relieve and protect the public health and welfare from aircraft noise." [49 U.S.C. 44715(a)(1)(A)]. The 1990 order is still in effect at MSP.

4. THE JUNE 8, 1990 FAA PRESS RELEASE

In violation of Rule 16(b) of the Federal Rules of Appellate Procedure ("FRAP"), on May 4, 2004 the FAA inserted a June 8, 1990 press release into the administrative record by amendment (App., *infra*, 14a). The "entire record" was due January 23, 2004 (FRAP Rule 17(b)(1)(A); App., *infra*, 8a).

When petitioners attempted to amend the administrative record in similar fashion, the Court (rightly) denied our amendment and instructed petitioners to obtain stipulations or file a motion for leave to supplement or amend the record, pursuant to FRAP Rule 16(b) (App., *infra*, 11a).

We believe the Court should also have denied the FAA's May 4, 2004 amendment inserting the June 8, 1990 press release into the administrative record *after*

petitioners had filed their Brief. The FAA did not have the right to unilaterally amend the record after January 23, 2004 (when the "entire record" was due).

The FAA Brief refers to this press release and a superficial reading might have led the court of appeals to conclude the press release appeared in the St. Paul Pioneer Press Dispatch the next day. However, this is not what took place. There was a newspaper article the next day, but the article made no reference to the FONSI nor did it put petitioners on notice where the public could access the FONSI and EA.

This late insertion in the record of the June 8, 1990 press release may have confused the court of appeals, as in their opinion, when denying our petition as "untimely," the court made a specific reference to this unpublished press release:

> Petitioners assert that it was impossible for them to file a petition within the sixty-day filing period. * * * We are not persuaded * * * The record also reveals that the FAA issued a press release on June 8, 1990, announcing its decision and noting where copies of the FONSI and EA could be accessed by the public. Thus, we find no merit in Petitioners' claim that the FAA concealed the 1990 order from the public. (App., *infra*, 4a-5a).

Petitioners have carefully scrutinized thirty-one editions of the newspaper (from June 8, 1990 to July 8, 1990, see Guy Heide Affidavit, App., *infra*, 23a) and this mysterious June 8, 1990 press release cannot be found.

CONCLUSION

Petitioners could not receive an adequate and sufficient notice of the 1990 order from an unpublished FAA press release. We believe the FAA has demonstrated a troubling lack of the candor due the court of appeals in inserting an unpublished press release into the administrative record.

5. THE COURT OF APPEALS' REFUSAL TO ADMIT JOHN G. BULOV

The court of appeals declined the petition to review the 2003 order over a failure to establish "standing."

On February 9, 2004 Guy Heide, Michael A. Kosel and Duane Taylor (who are Secretary, Chairman and Treasurer of the Airport Noise Reduction Committee) filed a Motion to admit John G. Bulov as a fourth petitioner.

Mr. Bulov is a member of the Airport Noise Reduction Committee. Mr. Bulov's home is "significantly" impacted by the 2003 order, his "standing" is "self evident." Mr. Bulov sought admittance to the proceeding to fight the FONSI.

Concerning representational standing, in Warth v. Seldin, 422 U.S. 490 (1974) the Supreme Court decided:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. * * * The association must allege that its members, or any

> one of them, are suffering immediate or threatened injury as a result of the challenged action (p. 511)
>
> As noted above, to justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. (p. 515)

Based on the foregoing precedent, the Airport Noise Reduction Committee believed it needed to admit only "one" of its members to establish standing. In Sierra Club v. E.P.A., 292 F.3d 895 (D.C. Cir. 2002), the D.C. Court allowed where standing is "self evident" from the administrative record, petitioners do not need to "supplement the record." (p. 900):

- The petitioners submitted a February 9, 2004 Motion to admit John G. Bulov.
- The FAA opposed Mr. Bulov's admittance arguing the Government (apparently the State public agency) would "take" the Bulov home prior to implementing the Alternative E departure procedure authorized by the FONSI.
- The FAA argued, since Mr. Bulov's "home would not exist at the time the runway becomes operational," he would "suffer no injury in fact from the adoption of the departure procedure." (App., *infra*, 13a).
- On February 25, 2004 the court of appeals without

explanation denied leave to admit John G. Bulov. (App., *infra*, 9a).

The FAA argument *supra* is surreal and unacceptable. The "taking" of the Bulov home is traceable to the 2003 order (the FONSI implementing the Alternative E departure procedure) and is itself material evidence that Alternative E has a "significant" impact and the 2003 order should be rescinded.

The "taking" of the Bulov home is the type of injury that (if Mr. Bulov were admitted) would establish standing as the injury (see Communities Against Runway Expansion v. F.A.A., 355 F.3d 678 (D.C. Cir. 2004):

> i. Demonstrates an injury to "at least one" of the group or association;
>
> ii. Is an "injury in fact" that is concrete, particularized, actual and imminent;
>
> iii. Is an injury traceable to the challenged action;
>
> iv. Is an injury that would be redressed by a favorable decision.

CONCLUSION

Mr. Bulov continues to seek admittance (see Affidavit of John G. Bulov, App., *infra*, 21a, 22a). We urge the Supreme Court to reverse the court of appeals' error in denying Mr. Bulov admittance to the proceeding. Admitting Mr. Bulov would establish petitioners' standing and permit a hearing to be held on the merits.

If this error is not reversed, Mr. Bulov (and others) will lose his home. (see Bulov Affidavit Item No. 3, App., *infra*, 21a). Mr. Bulov has followed the rules ("the due process of law") and deserves having his case heard. If the Bulov home is "taken," such "taking" would be "without due process of law" in violation of Amendments V and XIV respectively of the Constitution.

CONCLUSION

Petitioners add that they are representative of a larger class of persons. Guided by the cited precedents, the Airport Noise Reduction Committee felt it necessary to include only the minimum number as petitioners, additional petitioners could easily be added, as these orders are the subject of considerable controversy.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDICES

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IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC
Entered November 18, 2004

The Petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 18, 2004

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

OPINION AND JUDGMENT DISMISSING PETITION
Entered August 26, 2004

Before Judges MELLOY, LAY, and COLLOTON.

PER CURIAM.

Guy Heide, Michael Kosel, and Duane Taylor ("Petitioners") petition for review of a June 5, 1990, order ("the 1990 order") of the Federal Aviation Administration ("FAA") approving revised runway use procedures at the Minneapolis-St. Paul International Airport ("MSP"). Petitioners also seek review of an August 27, 2003, order ("the 2003 order") of the FAA approving departure procedures for a new runway under construction at MSP and scheduled to open in 2005. For each order, the FAA issued a finding of no significant impact ("FONSI") based on an environmental assessment ("EA") prepared under the National Environmental Policy Act, 42 U.S.C. [Sections] 4321 et seq. This court granted a motion by the Metropolitan Airports Commission ("MAC") to intervene in defense of the 2003 order. Because

Petitioners have not shown reasonable grounds for failing to file a timely petition for review of the 1990 order and do not have standing to seek review of the 2003 order, we dismiss their petition.

Petitioners filed their petition for review on October 27, 2003. A person having a substantial interest in an FAA order may petition for review of the order pursuant to 49 U.S.C. [Section] 46110(a). A petition for review filed under [Section] 46110 generally is not timely unless it is filed within sixty days of the issuance of the order. See 49 U.S.C. [Section] 46110(a). However, a court may allow a petition to be filed after the sixty-day period only when "there are reasonable grounds for not filing by the 60th day." Id.

Aware of the fact that their petition for review was filed more than thirteen years after the issuance of the 1990 order, Petitioners assert that it was impossible for them to file a petition within the sixty-day filing period. In support of this assertion, Petitioners argue that they did not become aware of the order until December of 2002 and that the FAA failed to give public notice about the order. We are not persuaded by either of Petitioners' arguments and consequently decline to exercise our discretion to allow the petition. The fact that Petitioners were not personally aware of the order until December of 2002 is irrelevant, as it is the date of the order's issuance

that is pertinent under [Section] 46110(a). Furthermore, the record reveals that the 1990 order was adopted following a lengthy process that included considerable public involvement. The record also reveals that the FAA issued a press release on June 8, 1990, announcing its decision and noting where copies of the FONSI and EA, could be accessed by the public. Thus, we find no merit in Petitioners' claim that the FAA concealed the 1990 order from the public.

Although Petitioners' request for review of the 1990 order was untimely, their request for review of the 2003 order was filed within the time period set by [Section] 46110(a). Nonetheless, the FAA and MAC argue that we do not have jurisdiction over the petition because Petitioners lack constitutional and prudential standing. We have an independent obligation to examine our jurisdiction, mindful of the importance of standing as a jurisdictional doctrine. See Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton, 320 F.3d 849, 850 (8th Cir. 2003).

The burden is on Petitioners to establish their standing. See Schanou v. Lancaster County Sch. Dist. No. 160, 62 F.3d 1040, 1045 (8th Cir. 1995). To establish constitutional standing, Petitioners must demonstrate that they have suffered an "injury in fact" that is fairly traceable to the action of the defendant and likely to be

redressed by a favorable court decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). For purposes of standing, the injury suffered must consist of an invasion of a legally protected interest that is actual, concrete, and particularized. Id. at 560.

We conclude that Petitioners have not established their standing. Apart from a generalized statement that Petitioners live near MSP and have economic interests in other properties impacted by the FAA order, Petitioners have provided no evidence of how they are injured by the departure procedures approved by the 2003 order. Petitioners' generalized statement fails to identify with particularity any injury they have suffered and is insufficient to establish standing when seeking review of the 2003 order. See Sierra Club v. E.P.A., 292 F.3d 895, 898 (D.C. Cir. 2002) ("Bare allegations are insufficient, however, to establish a petitioner's standing to seek judicial review of administrative action."). Moreover, as FAA and MAC point out, the departure procedures involve areas south and west of MSP. Petitioners, who are residents of Mendota Heights, Minnesota, live east of MSP in an area which the record shows will not be impacted by the departure procedures. Thus, Petitioners have not demonstrated a concrete, particularized injury due to the departure procedures. Because Petitioners have not shown an injury in fact, we need not address the causation and redressability requirements of

constitutional standing or the prudential limits on standing. See Delorme v. United States, 354 F.3d 810, 816 (8th Cir. 2004).

For the foregoing reasons, we dismiss the petition. We also deny all pending motions.

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

ORDER GIVING RESPONDENT ADDITIONAL TIME TO FILE THE ADMINISTRATIVE RECORD
Entered December 3, 2003

Respondent's motion for an extension of time to file the certified administrative record is granted.

Respondent may have until 1/23/04 to file the record.

Petitioner's Brief Due.....	2/06/04
Respondent's Brief Due.....	3/08/04
Reply Brief (optional) Due.....	3/22/04

(5556-010199)

December 3, 2003

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE
FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

ORDER DENYING MOTION FOR LEAVE TO ADMIT
JOHN G. BULOV AS AN ADDITIONAL PETITIONER
Entered February 25, 2004

Petitioner's motion for leave to add a party to the appeal has been considered by the court and is denied. (5009-010199)

February 25, 2004

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

ORDER GIVING RESPONDENT
ADDITIONAL TIME TO FILE BRIEF
Entered May 3, 2004

Respondent's motion for extension of time to file the brief is granted. Respondent may have to 5/4/04 to file the brief.

(5265-010199)

May 3, 2004

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

ORDER DENYING PETITIONERS' THIRD AMENDMENT TO AMEND THE ADMINISTRATIVE RECORD
Entered May 19, 2004

Petitioners have submitted a "Third Amendment to the Record – Volume XVIII." However, petitioner[s] have not submitted a motion for leave to supplement or amend the record, nor have they filed a stipulation showing the other parties' consent to the filing.

Petitioners are directed to file a motion or signed stipulation by June 2, 2004. The clerk will lodge Volume XVIII, but not file it, pending receipt of the motion or stipulation.

May 19, 2004

Order Entered Under Rule 27B(a):

(signature of Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

PETITIONERS' MOTION
TO ADMIT AN ADDITIONAL PETITIONER
Filed February 9, 2004

* * *

MOTION TO ADMIT AN ADDITIONAL PETITIONER

1. The Petitioners (Guy Heide, Michael A. Kosel and Duane Taylor) respectfully request that John G. Bulov, who resides at 3001 Long Meadow Circle in the City of Bloomington, Minnesota, be admitted as a fourth Petitioner in the above-described proceeding. John G. Bulov's letter of February 8, 2004 expressing joinder is attached.
2. Petitioners discussed this Motion with counsel for the Respondents, John A. Bryson, who did not think there would be an objection to this Motion.

WHEREFOR, Guy Heide, Michael A. Kosel and Duane Taylor request the Court grant a Motion to admit John G. Bulov as an additional Petitioner in the above-described proceeding.

* * *

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

RESPONDENTS' OPPOSITION TO MOTION TO ADMIT AN ADDITIONAL PETITIONER
Filed February 12, 2004

* * *

5. In addition, any petitioner must demonstrate its standing under Article III of the United States Constitution. See Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 180-181 (2000); Sierra Club v. EPA, 292 F.3d 895, 898-902 (D.C. Cir. 2002). Mr. Bulov, the proposed intervenor cannot do so. As shown by the attached declaration of the Manager of Aviation Noise and Satellite Programs for the Metropolitan Airports Commission (Att. 2), Mr. Bulov will suffer no injury in fact from the adoption of the departure procedure for Runway 17/35 because the Metropolitan Airports Commission will acquire his residence as part of the Commission's noise mitigation program and his home will not exist at the time the runway becomes operational (Att. 2, p. 6). Accordingly, the request to add him as a petitioner must be rejected on this ground as well.

* * *

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

RESPONDENTS' SECOND AMENDMENT TO THE ADMINISTRATIVE RECORD
Filed May 4, 2004

***

SECOND AMENDMENT TO CERTIFICATION, INDEX AND ADMINISTRATIVE RECORD

The Administrative Record is hereby amended to include additional documents as described below:

***

FAA News Release: Issued by FAA Office of Public Affairs, dated June 8, 1990, titled "Environmental Study Finds No Significant Impact For Proposed Change in Runway Use System Procedures at Minneapolis-St. Paul International Airport."

This material is included in the record for reference, but was not considered by the Federal Aviation Administration in making its decision.

(Signature of Annette Davis) 5-4-04
Annette Davis Date
Environmental Specialist

IN THE 8TH CIRCUIT COURT OF APPEALS

Guy Heide, et al. *v.* Federal Aviation Administration

A PETITION FOR REVIEW OF A DECISION OF THE FEDERAL AVIATION ADMINISTRATION
FILE NO. 03-3603

PETITIONERS' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
Filed October 25, 2004

* * *

1. On February 25, 2004 the Court erred when it denied Petitioners leave to admit John G. Bulov as an additional Petitioner.

Concerning petitioners whose standing is not "self-evident," the D.C. Court in Sierra Club v. E.P.A., 292 F.3d 895 (D.C. Cir. 2002) allowed where standing is "self evident" from the administrative record, petitioners do not need to "supplement the record." (p. 900) Petitioners whose standing was not self evident must establish standing "at first appropriate point in review proceeding" preferably before their brief. (p. 900) Petitioners were "given an additional opportunity." (p. 901) Petitioners "failed to demonstrate a substantial probability of injury to a single member" (the standard in Warth v. Seldin, *supra*) (p. 902)

a. Petitioners Guy Heide, Michael A. Kosel and Duane Taylor are members of an unincorporated group or association referred to as the "Airport Noise Reduction Committee." (For substantiation, see Record, Tab 152, where Petitioners first raised the 2003 Order with the FAA as members of the "Airport Noise Reduction Committee." In a September 16, 2003 letter the FAA declined to respond, advising the Committee's Secretary to file a petition for review.)

b. On September 28, 2001 John G. Bulov received a letter notifying him, subject to completion of an "environmental assessment" (EA), an offer to purchase his home at 3001 Long Meadow Circle, Bloomington, MN would be presented (p. 2).

c. The EA was drafted in October 2002, approved by Annette Davis (FAA) as the responsible Federal official, and then used to issue the 2003 Order (a FONSI) on August 27, 2003.

d. The John G. Bulov home is one of twelve dwellings identified in the EA as receiving a "significant" environmental impact. The FAA eliminates the "significant" impact by pre-

purchasing Mr. Bulov's home (an unusual procedure):

> The dwellings will be acquired prior to the implementation of the procedures being studied in this environmental assessment ... Therefore, the dwellings will not exist at the time the procedures are implemented ... As such, they cannot be impacted by the proposed project. (Record, Tab 164, p. 33)

e. On February 8, 2004 John G. Bulov wrote Petitioners expressing "joinder" and asked to associate himself with the Petitioners in this proceeding.

f. On February 9, 2004 Petitioners filed a motion to admit their associate, John G. Bulov. As suggested in Sierra Club v. E.P.A., *supra*, p. 900) the motion was filed before their brief was submitted.

g. The FAA opposed admitting Mr. Bulov arguing (in part) "his [John G. Bulov's] residence will be purchased." (Oppos., p. 5) The FAA attached an affidavit confirming "Mr. Bulov's home will not exist at the time the runway implementation procedures evaluated in the EA will commence." (Oppos. Att. 2, p. 2)

h. On February 25, 2004 the Court without

explanation denied leave to admit John G. Bulov.

i. On March 2, 2004 Petitioners filed their brief. The brief could not address the Court's refusal to admit John G. Bulov as the Court order arrived the day before the brief was due (March 1, 2004).

j. However, Petitioners in their May 21, 2004 reply brief (Pet. Rep. Br., p. 24) asked the Panel to reconsider their denial of John G. Bulov. Petitioners pointed out to the Panel one of their material allegations had been pre-purchasing dwellings (such as the residence of John G. Bulov) to eliminate "significant" impacts was "arbitrary, capricious" and contrary to the law. (Pet. Br., p, 32)

From the record, John G. Bulov clearly had "standing." In the EA/FONSI the FAA committed to "taking" his home; Mr. Bulov's home "will not exist" when the EA/FONSI is implemented. This is the type of injury that (if Mr. Bulov were admitted) would satisfy the Panel's concerns about "standing" as the injury (Communities Against Runway Expansion v. F.A.A., 355 F.3d 678 (D.C. Cir. 2004):

i. Demonstrates an injury to "at least one" of the group or association;
ii. Is an "injury in fact" that is concrete, particularized, actual and imminent;
iii. Is an injury traceable to the challenged action;
iv. Is an injury that would be redressed by a favorable decision.

Mr. Bulov's standing is self-evident to the degree that it was not necessary to "supplement the record" in his case. (Sierra Club v. E.P.A., 292 F.3d 900 (D.C. Cir. 2002)

If this Court will not grant rehearing *en banc*, Mr. Bulov will lose his house. Mr. Bulov's property will be "taken" by a Federal action that (the FAA asserts) does not have a "significant" impact[5].

Mr. Bulov still asks the Court to admit him. Mr. Bulov has followed the rules and deserved to have his case heard.

* * *

[5] Mr. Bulov expressed his befuddlement over the Court's denial of his admittance, stating "If there is no 'significant' impact, why are they buying my house?" (Pet. Reply Br., p. 24)

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AFFIDAVIT OF JOHN G. BULOV

IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI &
REQUESTING ADMITTANCE
TO THE PROCEEDING

---

1. I reside in and own a home at 3001 Long Meadow Circle in the City of Bloomington, Minnesota. The City of Bloomington borders Minneapolis-St. Paul International Airport ("MSP"). Runway 17 is about 5,340 feet from my home and the proposed flight track's centerline is approximately 750 feet away.

2. I am a member of the Airport Noise Reduction Committee.

3. The August 27, 2003 FAA Order (based on a Finding of No Significant Impact or "FONSI") asserted the proposed Runway 17 Departure/Arrival Procedures did not have a "significant" noise impact. However, under the Order, my home moves from having no appreciable aircraft noise exposure to an exposure of over 70 DNL (a "significant" aircraft noise impact). I believe my home is representative of over a hundred homes and apartments "significantly" impacted by the Order (requiring either purchase or insulation for aircraft noise by the Metropolitan Airports Commission). Believing my home is exposed to a "significant" impact, in a February 8, 2004 letter to

the Secretary of the Airport Noise Reduction Committee (Guy Heide), I requested admittance as a fourth petitioner in a proceeding to review the FONSI.

4. The FAA opposed my admittance, advising the Court:

> Mr. Bulov will suffer no injury in fact from the adoption of the departure procedure ... because ... his home will not exist at the time the runway becomes operational ... (See Respondents' February 12, 2004 Opposition, App. *infra*, 13a)

This "taking" of my residence, and others, confirms the "significant" impact of the Runway 17 Departure/Arrival Procedures.

5. In my judgment, a FONSI is an inappropriate environmental action. Further, it should not matter whether my home is at its current location or not to object to this procedure. In my opinion, the FONSI is an attempt to circumvent a more thorough environmental review.

6. I continue to request admittance to the proceeding.

JOHN G. BULOV
3001 Long Meadow Circle
Bloomington, MN 55425
952-854-2926

Subscribed and sworn to before me
this 15 of February, 2005

Notary Public

JUDITH GRAEBER YUKI
Notary Public - Minnesota
My Commission Expires Jan. 31, 201

AFFIDAVIT OF GUY HEIDE

IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

1. I am a petitioner in the petition for review filed with the 8th Circuit Court of Appeals.

2. I am the Secretary of the Airport Noise Reduction Committee.

3. I reside in and own a home at 881 Bluebill Drive in the City of Mendota Heights, Minnesota.

4. The newspaper serving the City of Mendota Heights is the St. Paul Pioneer Press Dispatch, a newspaper delivered each morning. On the dates of October 2, 2004, October 9, 2004 and October 19, 2004, I carefully inspected thirty-one (31) microfilmed copies of the St. Paul Pioneer Press Dispatch newspaper dated from June 8, 1990 to July 8, 1990 on file at the St. Paul Public Library.

5. The June 8, 1990 FAA News Release purportedly issued by the FAA Office of Public Affairs, titled "Environmental Study Finds No Significant Impact For Proposed Change in Runway Use System Procedures at Minneapolis-St. Paul International Airport" could not be found in the thirty-one (31)

newspaper editions inspected above, published on the day of the purported press release (June 8, 1990) and the thirty (30) days thereafter.

GUY HEIDE
881 Bluebill Drive
Mendota Heights, MN 55120
651-454-7440

CASSANDRA COOPET
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Commission Expires Jan. 31, 2008

Subscribed and sworn to before me
this 15th of February, 2005

Notary Public